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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BETTY MARIE MARTINEZ, Defendant and Appellant.	G049207 (Super. Ct. No. FWV1101770) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Stephan G. Saleson, Judge. Request for judicial notice. Judgment affirmed. Request denied.

Jeffrey R. Lawrence for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Betty Marie Martinez of attempted murder (Pen. Code, §§ 187, subd. (a), 664; all further undesignated statutory references are to this code) and assault with a firearm (§ 245, subd. (a)(2)). It found the attempted murder was willful, deliberate, and premeditated, with defendant personally and intentionally discharging a firearm, causing great bodily injury to the victim (§§ 664, subd. (a), 667.5, subd. (c)(8), 1192.7, subd. (c)(8), 12022.53, subds. (b), (d)), and also personally used a firearm during the attempted murder and the assault (§ 12022.53, subd. (b)). The trial court sentenced her to a 14 year determinate and a 32-years-to-life indeterminate term.

Defendant contends the court erred in failing to instruct the jury sua sponte on accident and mistake of fact and in allowing the introduction of her prior acts of violence. She also argues insufficiency of the evidence to support her conviction for willful, deliberate, premeditated attempted murder, prosecutorial misconduct, and ineffective assistance of counsel. Finding no error, we affirm the judgment and deny defendant's motion to augment the record, which we deemed a judicial notice request, as being unnecessary to our resolution of the issues.

FACTS

Seventeen-year-old Cesar Perez (where persons have the same surname, first names shall be used to differentiate them with no disrespect intended) was arguing with his girlfriend in front of his home, where he lived with his parents and younger siblings, when Tina Martinez and her husband Steven (defendant's cousin) drove by and stopped. Tina got out of the car and began yelling and cursing at Cesar, saying he was being disrespectful to his girlfriend. Cesar told them to mind their own business and they drove away. Though they lived two houses down, this was his first interaction with them.

Three days later, Cesar's older brother, Miguel, stopped by his parents' home. They were standing in the driveway when George Contreras, Miguel's wife's

nephew, arrived. Contreras parked near the Martinez house and walked towards them, saying, "'what's up'" in a loud, funny way. None of them said anything to defendant, who was sitting in front of the Martinez house with Serena Martinez, a teenager defendant had befriended. Steven had not told defendant about the confrontation with Cesar "because he knew of [defendant's] history . . . and didn't want to get her involved."

As Cesar was telling Miguel about the argument with his girlfriend and the confrontation with the Martinezes, defendant ran in their direction and began shooting a gun at them. Cesar ran toward his backyard with defendant in pursuit. He jumped over a gate and fell. When he got up, defendant was about two feet behind him. He asked her not to shoot him and crouched down but defendant pointed the gun at him and shot him in the back before she ran away. Had Cesar not crouched, the gunshot could have been fatal.

Defendant testified she did not know Cesar or anything about him before the shooting. On the day of the shooting, she was outside the Martinez house when she saw Contreras and another man walk by, one of whom pointed at Steven. Defendant went inside and upon looking out a window, saw four men she believed to include Cesar, Miguel, Contreras, and an unidentified man standing in the Perez yard pointing toward the Martinez house. Thinking "something was going on," she grabbed her gun and went out to the front porch, where Serena joined her. Contreras began singing, "Hey, sexy lady" in Serena's direction, which defendant believed was disrespectful.

According to defendant, Cesar then yelled in reference to her, "Fuck that bitch. . . . When homies come we going to get fucking cracking." Believing that meant "he had people coming over to harm me and my family," defendant got up, walked toward the men, and started shooting in Cesar's direction. As the men ran, defendant chased Cesar, "running full-blown after him" for 150 feet. Defendant believed Cesar remained "a threat even while he was running" with his back toward her with no weapons in his hands. Cesar jumped the gate to his backyard and fell, with defendant right behind

him. Defendant was trying to jump over the wall when Cesar got up and bumped her gun, causing it to accidentally discharge into his back. Defendant was "an expert shooter" and had not intended to shoot or kill Cesar, but only to grab him. Scared and knowing she had done "something wrong," defendant fled and disposed of the gun. Despite being diagnosed with Post-Traumatic Stress Disorder (PTSD) in 2008 while she was enlisted in the Army, and again before trial, she admitted she had not had a flashback and "knew what was going on" when she shot Cesar.

DISCUSSION

1. Duty to Instruct on Accident and Mistake of Fact

Defendant argues the court erred in not instructing the jury sua sponte on accident and mistake of fact. The court had no duty to do so because (1) it had given complete and accurate instructions on the mental element of attempted murder, (2) unlike true affirmative defenses, the defenses of accident and mistake of fact would have served only to negate the mental state element, and (3) defendant never requested a pinpoint instruction. (*People v. Anderson* (2011) 51 Cal.4th 989, 996-999 [under above facts, no duty to instruct sua sponte on accident; court's only obligation was "to provide an appropriate pinpoint instruction upon request by the defense"]; *People v. Lawson* (2013) 215 Cal.App.4th 108, 117-118 [no duty to instruct sua sponte on mistake].)

2. Sufficiency of Evidence for Willful, Deliberate, and Premeditated Attempted Murder

Although defendant contends substantial evidence does not support her conviction for willful, deliberate, and premeditated attempted murder, she limits her arguments to the attempted murder charge. Her failure to address the true finding the attempted murder was willful, deliberate, and premeditated forfeits any such claim. (*People v. Hardy* (1992) 2 Cal.4th 86, 150.) And "'"'review[ing] the entire record in the

light most favorable to the judgment'"'" (*People v. Harris* (2013) 57 Cal.4th 804, 849), we conclude substantial evidence exists to support the attempted murder conviction.

"[F]iring at point-blank range . . . undoubtedly creates a strong inference that the killing was intentional" (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945; see also *People v. Lee* (1987) 43 Cal.3d 666, 679 [firing on police officers 15 to 20 feet away constituted shooting "'at near "point blank" range'"]) and "'"the act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .'"'" (*People v. Perez* (2010) 50 Cal.4th 222, 230). Here, Cesar testified defendant "was literally right behind" him, about two feet away, when she shot him. Before being shot, he turned around to see if defendant was behind him and when he saw she was, he told her not to shoot him and then turned around and crouched down with his hands on his head. The prosecution's expert testified that had Cesar not done so, the shot likely would have been lethal. The jury thus could have reasonably found defendant shot Cesar at close range or that defendant fired at him in a way that could have been fatal. Either way, substantial evidence supports an inference defendant intended to kill Cesar.

Defendant maintains she "was an expert military trained shooter" and could have killed Cesar had that been her intent by shooting "the balance of her 10 round clip into him," but instead ran away upon realizing she had shot him. According to defendant, she wanted to scare him "and shake some sense into him, so he would stop screwing with her family." Alternatively, defendant claims the jury should have found she "suffered from PTSD, which [it] should have used to mitigate or negate[] the specific intent . . . but [it] didn't rely on it at all." But defendant also testified that despite her PTSD, she "did not have a flashback" and "knew what was going on," as well as what she had done was wrong. Having found substantial evidence to support the attempted murder charge, we will not reweigh the evidence. (*People v. Harris*, *supra*, 57 Cal.4th at p. 849.)

3. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during closing argument. No misconduct occurred.

a. Attacks Against Defense Counsel

Defendant argues the prosecutor "made several personal attacks against [her counsel]." "'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.)

First, defendant asserts the prosecutor improperly accused her counsel of vouching for her when he said, "no matter who [his daughter] becomes, if she's half the patriot that [defendant] is, if she's half the woman that [defendant] is . . . I'll be a very proud dad indeed." The prosecutor responded, "As far as vouching for anybody and making . . . comments about someone else's guilt or what a great person they are, it's just what's in the shoebox. . . . Nobody should be vouching for anybody's credibility." The court properly overruled defendant's objection because these statements were a fair response to defense counsel's comments and correctly stated the law. (*People v. Williams* (1997) 16 Cal.4th 153, 257 [improper vouching includes "'attempt to bolster a witness by reference to facts *outside* the record'" such as "'through personal assurances of the witness's veracity'" based on "'purported personal knowledge or belief'"].)

Second, defendant claims the prosecutor accused her counsel of "having a nefarious intent and intentionally trying to 'dirty up' her witnesses" during his cross-examination of Deanna Owens. Owens had testified on direct examination that she had been dating Paul Perez and when she went to his residence, at his request, defendant beat her and broke her nose. On cross-examination, defense counsel elicited testimony Owens went to Paul's place to confront him for giving her a sexually transmitted disease (STD).

Although this was proper impeachment evidence, the prosecutor did not criticize defense counsel for that but rather was noting the difference between asking about the STD once to show a person lied and asking about "it three times to dirty up that victim to the point where I have to say objection, asked and answered three times." The failure to object forfeits the issue on appeal. (*People v. Gonzales* (2011) 51 Cal.4th 894, 920.) The remarks were also fair comment on defense counsel's repetitive questions to Owens and no reasonable jury would have perceived that as an assault on defense counsel's integrity.

Third, defendant asserts the prosecutor's statement on rebuttal that defense counsel "testified [during closing argument] . . . there are no apartment complexes directly across from the Perezes, because the photographs show there are none" improperly accused her counsel of testifying. The court overruled defendant's objection, stating, "It's argument." We agree the prosecutor's statements fell within her "wide latitude to vigorously argue . . . her case and to make fair comment upon the evidence" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726) and defense counsel's closing argument as to where the apartment complex was located.

Lastly, defendant argues the prosecutor accused defense counsel of misleading Cesar by stating, "[Defense counsel] wants you to make this leap" that Cesar testified one way in the preliminary hearing and "changed his story here . . . . How would [Cesar] know to do that? Did he really change his story or did the questions that [defense counsel] was asking him change?" No reasonable juror would have construed this as accusing defense counsel of misleading Cesar or an attack on counsel's integrity, as opposed to an assertion that it was only the form of the questions changed.

b. "Deceptive Tactics" Relating to Defense Expert

Defendant next contends the prosecutor engaged in misconduct by "continually refer[ing] to [the defense expert] as a hired gun, implying that but[-]for paying her, she would not have diagnosed [her] with PTSD." The failure to provide

record references violates California Rules of Court, rule 8.204(a)(1)(C) (all further rule references are to these rules) and forfeits the argument (*Sky River LLC v. County of Kern* (2013) 214 Cal.App.4th 720, 741). Even if the issue was preserved, "harsh and colorful attacks on the credibility of opposing *witnesses* are permissible. [Citations.] Thus, counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.'" (*People v. Arias* (1996) 13 Cal.4th 92, 162.)

Defendant also claims the prosecutor committed misconduct by pointing out the defense expert "never linked PTSD to the shooting" because "expert[s] cannot give their opinions on the ultimate fact in the case." But although "'section 29 prohibits an expert witness from giving an opinion about the ultimate fact whether a defendant had the required mental state for conviction of a crime[,] [*i*]*t prohibits no more than that*.'" (*People v. Cortes* (2011) 192 Cal.App.4th 873, 910-911.) Rather, a defendant may "present[] expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, *or how that diagnosis or condition affected him at the time of the offense*, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent . . . ." (*Id*. at p. 908, italics added.) It was therefore not misconduct for the prosecutor to note the absence of evidence of how defendant's purported PTSD affected her at the time of the shooting.

c. Defendant's Fights in High School

Defendant's final claim of misconduct is that the prosecutor improperly elicited testimony from her on cross-examination that she had been in fights in high school and then "mentioned them multiple times during her closing argument" because they were not mentioned in the prosecution's pretrial motion to introduce evidence of defendant's prior bad acts. But she forfeited the issue when her attorney did not object during questioning or closing argument (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 920),

and she failed to provide any record references in her opening brief (rule 8.204(a)(1)(C); *Sky River LLC v. County of Kern*, *supra*, 214 Cal.App.4th at p. 741). The prosecutor also "reserve[d] the right to introduce . . . additional, uncharged acts of the defendant" and the court never limited the impeachment evidence to the instances mentioned in the motion. Thus, the prosecutor did not "elicit[] or attempt[] to elicit inadmissible evidence in violation of a court order." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

4. Admission of Uncharged Prior Bad Acts by Defendant but not the Victims

Defendant contends the court erred in allowing the prosecution to introduce evidence of her prior bad acts under Evidence Code section 1101, subdivision (b) while denying her request to present evidence of Cesar's and Contreras's violent characters under Evidence Code section 1103, subdivision (a)(1). No abuse of discretion occurred.

a. Evidence Code section 1101, subdivision (b)

Before trial, the court granted the prosecutor's request to introduce evidence of three uncharged acts against defendant because "the probative value exceeds the prejudicial value, and . . . is relevant on intent, motive, certainly goes to the mental state, which has been placed in issue by [defendant]. And should a mental health practitioner and/or . . . [defendant] testify, . . . [the prosecutor] would be allowed to impeach that testimony." The court did not abuse its discretion in so ruling.

Although Evidence Code section 1101, subdivision (a) prohibits using character evidence to prove a person's conduct on a specific occasion, subdivision (b) allows evidence of criminal acts otherwise excludable under subdivision (a) to be admitted if the acts are "relevant to prove some fact (such as . . . intent, . . . absence of mistake or accident . . .) other than . . . her disposition to commit such an act." To justify admission, the uncharged conduct must bear some resemblance to the charged crime and the requisite degree of similarity will vary depending upon the purpose for which the

evidence is admitted. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "The least degree of similarity (between the uncharged acts and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence of self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act. . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance."'" (*Ibid*.) A defendant's not guilty plea places all elements of the crimes in dispute. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.) We review a court's ruling under Evidence Code section 1101 for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

One of the uncharged crimes here was the incident in which defendant beat Owens and broke her nose at Paul's residence. Defendant argues that because the court had ordered the count charging this offense to be severed from the present case, the same logic should have applied "when considering whether to allow it as a prior bad act." But evidence of a severed count may be admitted under Evidence Code section 1101, subdivision (b) where, as here, it is relevant to prove a fact such as intent, motive and absence of mistake. (See *People v. Matson* (1974) 13 Cal.3d 35, 40.)

In another uncharged prior act, defendant enlisted Paul's help to threaten neighbors whose five-year-old son was fighting with her two-year-old nephew. Defendant contends evidence of this incident was inadmissible because she was not present when it occurred, denied asking him to do that, was not charged with a crime, and it was not one of the acts listed in the jury instructions. But defendant forfeited any error by failing to provide record references (rule 8.204(a)(1)(C); *Sky River LLC v. County of Kern*, *supra*, 214 Cal.App.4th at p. 741) or any "'reasoned argument and citations to authority'" (*Nelson v. Avondale Homeowners Assn*. (2009) 172 Cal.App.4th 857, 862) as to how these unsupported facts made the incident inadmissible.

Defendant's claim also lacks merit. Detective David Rowe testified that defendant, who lived with her aunt and nephew in a second story apartment, told him she "went downstairs to confront the parents" of the other boy, during which she believed the father "reach[ed] for a gun." She "called Paul because she knew [he] would take care of the problem." Upon arriving, Paul "went downstairs, confronted the neighbors by banging on the windows and . . . the door and they had an argument." When he left, defendant went downstairs to "confront[] the family again." Thus, even if defendant was not present when Paul intimidated the family, she instigated the altercation and personally confronted the other boy's father twice. This supports the prosecutor's theory that defendant acted intentionally and not in self-defense or due to her PTSD.

The record is unclear as to whether defendant was charged with a crime because the court sustained objections to questions about whether she and Paul were arrested. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 609 ["[g]enerally, evidence of mere arrests that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character"].) But Evidence Code section 1101, subdivision (b)'s "recognition of the admissibility of certain evidence to prove such things as 'preparation,' 'plan,' and 'identity,' is not limited . . . to 'uncharged offenses'; it embraces also 'other acts'" (*People v. Harris* (1978) 85 Cal.App.3d 954, 958), which "need not be a crime to be admissible" (*People v. Wills-Watkins* (1979) 99 Cal.App.3d 451, 456, fn. 1) and extends to prior statements (see *People v. Rodriguez* (1986) 42 Cal.3d 730, 756-757; see also *People v. Kovacich* (2011) 201 Cal.App.4th 863, 893 [the defendant's statements to detectives admitting he kicked family dog admissible to show motive].) Defendant's statements to Rowe were thus admissible.

As to this prior act not being included in the jury instructions, defendant fails to explain why that was prejudicial. The court instructed the jury with CALCRIM No. 375, which informs the jury "[t]he People presented evidence that the defendant committed other acts that were not charged in this case" and instructs on the limited

purpose for which the other acts could be used. Because this incident was an act that was not charged, we presume the jury understood, followed, and applied the instruction to it absent any contrary indication. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

The third uncharged event involved defendant hitting a fellow inmate while in jail awaiting her trial. Deputy Sheriff Suzanne Healy testified that defendant told her she had assaulted the inmate because she "'was tired of her mouth.'" According to defendant, "this prior bad act . . . has no similarity to the case at bar, and it occurred under entirely different circumstances and stressors, i.e., she was in jail." But "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) Even where "acts were dissimilar in the circumstances of their commission" (*ibid*.), they are admissible if they tend to support an inference that defendant probably harbored the same intent in each instance. (*Ibid*.) Here, evidence of defendant's motive in hitting the fellow innate tended to demonstrate she intentionally acted in anger or in response to what the victims said, rather than in self-defense or as the result of PTSD.

b. Evidence Code section 1103, subdivision (a)(1)

Under Evidence Code section 1103, a defendant claiming self-defense to an assaultive crime may, at the court's discretion, present evidence of a victim's violent nature to show the victim was the aggressor. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-448.) Defendant argues the court abused its discretion in disallowing such evidence regarding Cesar and Contreras. We disagree.

In a pretrial hearing, defendant conceded Evidence Code section 1103 evidence was not admissible against Contreras because he was no longer named as a victim in the information. (See Evid. Code, § 1103, subd. (a) [statute applies only to a "victim of the crime for which the defendant is being prosecuted"].) Regarding Cesar,

defendant failed to lay "a foundation . . . tending to show that the victim was the aggressor." (*People v. Rigney* (1961) 55 Cal.2d 236, 245.) Defendant testified she did not know Cesar or anything about him. Although she claimed she might have seen Cesar with a cell phone or a weapon in his driveway and heard comments about "homies" and "cracking," she did not see any weapons in his hands when he began running as she started shooting. Yet, she chased him into his backyard and shot him in the back as he crouched on the ground. Because no evidence was presented showing Cesar was the aggressor or posed a threat to defendant, excluding evidence of his purported "propensity for violence [was] proper." (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 828.)

5. Ineffective Assistance of Counsel

a. Failure to Call Contreras and Dr. Jakle at Trial

Defendant contends her counsel rendered ineffective assistance by not calling Contreras and Dr. Katherine Jakle, the psychologist who originally diagnosed her with PTSD, to testify at trial. But failure to call certain witnesses does not constitute ineffective assistance where no showing is made "such witnesses could be located" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1032) or "that particular witnesses were ready, willing and able to give mitigating testimony" (*People v. Medina* (1995) 11 Cal.4th 694, 773). Here, defendant failed to demonstrate Contreras could be located, much less be willing to testify, especially where the prosecutor removed him from her witness list because she could not find him, and defense counsel admitted during closing arguments that Contreras was "nowhere to be found" despite his investigator's efforts. Nor did defendant show Dr. Jakle was willing and available to testify.

Defense counsel also could have decided not to pursue Dr. Jakle's testimony based on a reasonable conclusion it would have been cumulative to the defense expert's. (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1716.) By testifying that defendant's medical records showed Dr. Jakle had diagnosed defendant with PTSD in

2008, the defense expert both negated the prosecutor's theory she was only a hired gun and showed defendant had been "suffering from . . . PTSD long before the shooting"—nullifying the two reasons defendant claims Dr. Jakle's testimony was necessary.

b. Failure to Object to Questions About Fights in High School

Defendant next asserts she received ineffective assistance because her counsel did not object to the questions about her high school fights. But "'[f]ailure to object rarely constitutes constitutionally ineffective legal representation . . . .' [Citation.] Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' [Citation.] . . . For example, counsel could have preferred not to draw the jurors' attention to particular comments by the prosecutor by objecting to them." (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) We reject the claim given that counsel was not asked for an explanation and may have decided not to draw the jury's attention to the incident or concluded the evidence was properly admissible on rebuttal because "'it "tend[ed] to disprove a fact of consequence on which the defendant has introduced evidence"'" (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 27), i.e., that she was acting in self-defense or due to her PTSD.

c. Failure to Request CALCRIM Nos. 3404 and 3406.

Defendant claims her counsel provided ineffective assistance by not requesting CALCRIM Nos. 3404 (accident) and 3406 (mistake of fact). She asserts counsel should have requested these instructions given her testimony she did not intend to kill Cesar and shot him by accident when he bumped into her gun and that she mistakenly believed Cesar had a gun. We need not decide whether counsel was deficient because no prejudice has been shown. (*People v. Mendoza* (2000) 24 Cal.4th 130, 170.)

The essence of both defenses, i.e., that defendant lacked the intent to kill (see *People v. Anderson*, *supra*, 51 Cal.4th at pp. 997-998; *People v. Lawson*, *supra*, 215 Cal.App.4th at p. 111), was effectively encompassed in the court's instructions on attempted murder. The jury not only determined she intended to kill Cesar by finding defendant guilty of attempted murder, but that she tried to kill him in a willful, deliberate, and premeditated manner. This shows the jury necessarily rejected defendant's accident and mistake of fact defenses. Defense counsel's failure to request instructions on accident and mistake of fact was not thus prejudicial and is not cause for a reversal. (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1313-1316 [failure to instruct on defense of accident and misfortune harmless where jury necessarily resolved defenses against the defendant by convicting him of attempted premeditated murder], disapproved on other grounds in *People v. Anderson*, *supra*, 51 Cal.4th at p. 998, fn. 3.)

DISPOSITION

Defendant's request for judicial notice is denied. The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.